THOMAS MEIKLES STORES LTD
versus
RICHARD MUVIRIMI
and
KAMURAYI MAMBAYO

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 13 October, 2 and 23 November 2005

Opposed Application

Mr *Chihambakwe*, for the applicant
Mr *Mugandiwa*, for the 1st respondent
Mr *Machaya*, for the 2nd respondent

BHUNU J: The facts in this case are to a large extent common cause. The undisputed facts are that both respondents are employees of Century Discount House Limited, a company duly incorporated in terms of the laws of Zimbabwe. In that capacity they were authorised signatories for and on behalf of Century Discount House Limited.

Their duties included issuing and signing cheques on behalf of their employer.

On the 29th December 2003 and in the course of employment both respondents issued and signed a cheque in the applicant's name for $757 024 582.47. In signing the cheque both respondents did not use any recognised symbols such as "p.p" or "for" to show that they were signing in their representative capacity. Century Discount house Limited subsequently ran into problems and was placed under provisional liquidation with the result that the cheque was dishonoured upon presentation. In consequence whereof the applicant sued both respondents in their personal capacities for redress.

The respondents entered appearance to defend claiming that they were not personally responsible for the applicant's loss because they signed the cheque in their representative capacities.

Relying on section 25(1) of the Bills of Exchange Act [*Chapter 14:02*] the applicant is now seeking summary judgment on the basis that it has an unassailable case against the respondents.

The section reads:

> "Where a person signs a bill as drawer, endorser or acceptor adds words to his signature including that he signs for and on behalf of a principal or in a representative character, he is not personally liable thereon."

It is common cause that in issuing and signing the cheque the respondents did not expressly disown personal liability by making any endorsements upon the face of the cheque.

Placing reliance on a furore of decided cases and legal texts the applicant argues that the respondents' admitted failure to disown personal liability renders them personally liable.

After having surveyed a number of authorities CHATIKOBO J made the following pertinent observation in the case of *Clan Transport Co. P/L vs Pemhenayi and Another* 1999(1) ZLR 520(H) at 523A-E.

> "The principle that a person who signs a cheque on behalf of a company without qualifying his signature is personally liable is so engrafted into our law that HIEMSTRA J ……. referred to it as a universal rule …
>
> A signer of a company cheque who does not intend to attract personal liability on the cheque must use words which make his status as an agent clear."

At paragraph C the learned judge was at pains to profer guidance on how a court should determine whether or not the signor has excluded personal liability. The learned judge articulated the guidelines as follows:

> "In deciding whether the instrument, on the face of it indicates that the defendants signed in a representative capacity, one considers the instrument as a whole in search of inferences or obvious conclusions to be gathered from its terms, bearing in mind at all times that the question has to be decided not according to other documents or allegations but according to the tenor of the cheque which on the face of it renders both defendants jointly and severally liable per LEON J in *Trust Bank Ltd vs Dugmore and Another* 1972(3) SA 926(D) at 931A"

The elevation of the principle to a universal rule of law finds expression in the words of LORD ELLENBOROUGH in the ancient case of *Leadbitter v Farrow* 1816 105ER 1077 at 10798 where he remarked that:-

> "Is it not a universal rule that a man who put his name to a bill of exchange thereby makes himself personally liable unless he states upon the face of the bill that he subscribes it for another or by procuration of another which are words of exclusion, unless he says plainly "I am the mere scribe" he becomes liable."

Undoubtedly LORD ELLENBOROUGH's remarks related to a rather arcahic and primitive era more than 200 years ago. Since then there have been technological developments which have drastically altered the mode of generating and transacting bills of exchange. Those remarks related to an era when computer generation of bills of exchange and electronic banking were unheard of. The computer placement of a company's name and account number on a bill of exchange as a way of identifying the company was virtually unknown.

What emerges quite clearly from a perusal of the cases is that the law has tended to lag behind technological developments.

In more recent times there has been a gradual awakening to the need for the legal developments to keep pace with technological developments if justice and fairness is to be done.

As a result doubts have been expressed in at least two cases as to whether LORD EDDENBROUGH's dictum continues to stand the test of time. See *Akasia Finance v Da Souza* 1993 (2) SA 337 at 339 and *Schmidt and Anor v Jack Brillard Printing Services CC* 2000 (3) SA 824 at 830E.

Having said that, it appears to me that there is need in our jurisdiction for a careful reassessment and authoritative pronouncement of the legal effect of what has been termed the universal rule and a proper interpretation of section 25 of the Bills of Exchange Act [*Chapter 14:02*] in relation to technological developments and common intention of the parties concerned.

It is trite in our law that consensus is of the essence of contract. Contracts ought therefore to be interpreted with a view to giving effect to the common intention of the parties.

It is apparent from the foregoing sentiments that personal liability need not be expressly excluded. Liability may be excluded by inference upon a careful examination of the totality of the disputed instrument.

While it is true and a matter of common cause that both respondents did not expressly exclude personal liability, it is also true and correct that the disputed intrument is clearly inscribed on the face of it with the name and bank account number of the respondents' principal. Both respondents have sought to rely on that inscription for cover. Whether or not the inscription provides sufficient cover so as to

exclude personal liability by necessary inference is a matter of evidence and interpretation.

It is clear to me that the respondents' reliance on the above inscription points to a valid defence and therefore raises a triable issue.

It is trite that summary judgment provides an extraordinary remedy designed to give speedy relief to a litigant who has established a clear unassailable case without the rigors and expense of a fully fledged trial. It however negates the basic principle of natural justice that is to say the *audi alteram patem* rule. As such it should be granted in clearly unanswerable cases.

In this case the respondents having pointed to a possible valid defence on the merits, the application cannot succeed.

It is accordingly ordered that the application be and is hereby dismissed with costs.

Chihambakwe, Mutizwa and partners, the applicant's legal practitioners
Wintertons, the 1st respondent's legal practitioners
Scanlen and Holderness, the 2nd respondent's legal practitioners